FILED
JUL 20 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 08-1553 & 08-1554

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner.

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

JOHN W. BUTLER
Counsel of Record
MARC J. FINK
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 463-2500

Counsel for Amicus Curiae
The World Shipping Council

July 20, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE WORLD SHIPPING COUNCIL	1
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391 (7th Cir. 1992)	5
Norfolk So. Ry. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (2004)	6
Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700 (4th Cir. 1993)	6
Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54 (2d Cir. 2006)	5, 10
STATUTES	
46 U.S.C. § 30701 Note	2
46 U.S.C. § 40101 et seq.	8
46 U.S.C. § 40102(12)	8
46 U.S.C. § 40102(22)	2
46 U.S.C. § 40102(24)	8
46 U.S.C. § 40102(25)	8
46 U.S.C. § 40301(a)(1)	8
46 U.S.C. § 40501(a)(1)	8
46 U.S.C. § 40502(c)	8
46 U.S.C. § 41105(4)	8
49 U.S.C. § 10501(b)	8
49 U.S.C. § 11706	3
49 U.S.C. § 11706(d)	4
49 U.S.C. § 13521	7
OTHER AUTHORITIES	
Definition of "Package" Under the Carriage of Goods by Sea Act, 23 Shipping Reg. Rep. (P&F) 111 (Fed. Maritime Comm'n 1985)	8
United States Maritime Admin., U.S. Waterborne Container Import by U.S. Customs Ports, http://www.marad.dot.gov/documents/Container_by_US_Customs_Ports.xls	4

IN THE

Supreme Court of the United States

Nos. 08-1553 & 08-1554

KAWASAKI KISEN KAISHA LTD., *et al.*,
Petitioners,

and

UNION PACIFIC RAILROAD COMPANY,
Petitioner.

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WORLD SHIPPING COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF THE WORLD SHIPPING COUNCIL

The World Shipping Council ("WSC") is a non-profit trade association of 29 companies that operate 36 international shipping lines.[1] WSC's members

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part. WSC also hereby discloses that petitioner Kawasaki Kisen Kaisha Ltd. is a member of WSC. Because the

include the full spectrum of vessel-operating common carriers, offering containerized, roll-on/roll-off, and car carrier services. WSC's members together provide over ninety percent of the containerized ocean transportation that serves the United States import and export trades.

A substantial percentage of the containerized shipments handled by WSC's members are the sort of "through" or "intermodal" arrangements at issue in this case. These are shipments for which the ocean carrier takes responsibility for the transportation transaction from origin to destination, including an inland "leg" of the transportation in addition to the ocean "leg," and issues a single "through bill of lading" to the shipper (the entity that owns or controls the cargo[2]) setting forth the terms of that transportation. The ocean carrier then subcontracts – with the cargo owner's consent – with rail and/or motor carriers for the inland leg of the cargo movement.

As in the case for which petitioners seek review, the through bills of lading issued by WSC's members typically include clauses that specify that the Carriage of Goods By Sea Act, 46 U.S.C. § 30701 Note ("COGSA"), shall apply to both the inland and the ocean components of the transportation, and that the COGSA liability limitations shall extend to railroads and truckers hired by ocean carriers to provide the

---

expense of preparing this brief was paid from WSC's general budget, petitioner Kawasaki Kisen Kaisha Ltd. contributed in proportion to its share of the organization's membership dues (approximately 3.9%). Pursuant to Court Rule 37.2(a), all parties have consented to the filing of this brief, and WSC provided timely advance notice of this filing to all counsel of record for the parties.

[2] *See* 46 U.S.C. § 40102(22).

land transportation portion of the move. Thus, a single and predictable liability rule covers the entire transportation contracted for by the ocean carrier, regardless of whether damage to the goods occurred on the ocean leg, on the inland leg, or at an undetermined point in the journey (which is commonly the case).[3]

Whether the Carmack Amendment, 49 U.S.C. § 11706, or COGSA governs cargo liability for the inland portion of through international ocean transportation is of great importance to WSC's members. Whether or not there is a cargo claim on any given shipment, the issue of which liability regime applies affects every shipment, because the differences in venue options, amount of liability, and duty of care between the two statutes influence pricing, insurance arrangements, and the extent to which carriers may choose to offer intermodal transportation. Given the amount of trade affected, the broad range of entities affected (ocean carriers, rail carriers, motor carriers, cargo interests both in the U.S. and overseas, and the insurers that each party in the supply chain retains), and given the split among and confusion within the lower courts, resolution of this case by the Court is exceptionally important to the efficient and predictable flow of U.S. international trade.

---

[3] If a shipper wishes to arrange separately for the inland transportation of its goods with a truck or rail carrier and for ocean transportation with an ocean carrier, it is always free to do so. The facts of this case (and the many thousands of factually similar intermodal shipments) involve a shipper that for its own convenience chose to engage an ocean carrier to handle the "through" move, including the inland portion of the transportation, under the ocean carrier's single bill of lading.

REASONS FOR GRANTING THE WRIT

WSC agrees with the reasons presented by both petitioners in support of review. The circuit split involves most of the major maritime circuits, and there is virtually no possibility that the split will be resolved without the intervention of this Court. WSC files this brief as *amicus curiae* in order to highlight several practical implications of the current circuit split that were not fully developed in the petitions.

1. First, the amount of cargo potentially affected by the decision below is extensive. According to 2008 statistics compiled by the United States Maritime Administration, approximately fifty-five percent of all containerized U.S. import cargo enters the country through seaports located within the jurisdiction of the Ninth Circuit. *See* United States Maritime Administration, U.S. Waterborne Container Import by U.S. Customs Ports, available at http://www.marad.dot.gov/documents/Container_by_US_Customs_Ports.xls. However, because the venue provisions in the Carmack Amendment allow suit to be filed in the judicial district where the rail transportation began regardless of the location of the cargo loss, *see* 49 U.S.C. § 11706(d), the geographic scope of the ruling below is actually much greater than the footprint of the Ninth Circuit. Although a substantial amount of cargo arriving at ports on the U.S. west coast is delivered within the boundaries of the Ninth Circuit, an equally substantial amount continues inland to other judicial circuits throughout the country. Thus, a claim arising from a train wreck outside of Chicago might be brought in the U.S. District Court for the Central District of California and governed by Ninth Circuit law if the container was transferred from ocean vessel to rail in the Port of Long Beach, Cali-

fornia. That would be the case even though the accident occurred within the boundaries of the Seventh Circuit, a circuit that applies a rule contrary to the rule in the case for which review is sought. *See Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992).

2. Second, and related to the broad geographic reach of the Ninth Circuit's decision, the combination of a pervasive circuit split and the unique venue provisions of the Carmack Amendment make it difficult to predict which liability regime might apply to any given shipment. That in turn makes it difficult for the shipper and the ocean carrier to negotiate price and liability terms for the transportation and difficult for both parties to manage their risk.

With respect to the lack of predictability caused by the circuit split, the Long Beach to Chicago example, in which the judicial circuits at the beginning and the end of the rail transportation employ different inland cargo liability rules for through international shipments, is probably the simplest. Because all international cargo arriving via west coast ports is potentially subject to the Carmack Amendment for the inland leg of the transportation under the decision below, parties might simply assume that injured shippers would sue in the courts within the Ninth Circuit, and plan accordingly. On the east coast, however, the issue is more complicated. Many ocean carriers, for example, operate vessels that call both in New York, New York, and in Norfolk, Virginia, on the same voyage. Cargo transferred from vessel to truck or rail in New York is subject to the Second Circuit rule, which is the same as the Ninth Circuit rule, *see Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54 (2d Cir. 2006), while cargo transferred

from vessel to inland conveyance in Norfolk is subject to the contrary Fourth Circuit rule, *see Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993). Thus, cargo on the same ship may be subject to different liability regimes based solely on the port at which it is discharged.

One might argue that carriers could still plan for the differences based on the anticipated port of discharge. But weather, port congestion, sale of the cargo in transit, and changes in shipper plans can all affect the discharge port after the vessel has sailed and the paperwork is done, and thus any attempt to anticipate which rules might apply could be for naught.

A typical, single containership operated by an ocean carrier will carry thousands of containers, with different origins and destinations, with vessel ports of call subject to change for operational reasons, and with importers frequently changing the U.S. port of discharge and/or the U.S. point of destination for their goods after booking the transportation.[4] The idea of documen clerks perusing maps of the United States judicial circuits to determine which inland liability regime might apply as they issue individual bills of lading, make routing decisions, or receive and process destination change orders from shippers is more than a little absurd. More directly, it is simply unacceptable in an area of commerce that is clearly governed by federal law, and in which uniformity, efficiency, and predictability are essential, for parties to have to guess as to what law will govern their activities. *See Norfolk So. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543

---

[4] The international liner shipping industry makes roughly 22,000 calls at ports in the United States each year.

U.S. 14, 29 (2004) ("Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning."). The situation is all the more unacceptable where affected parties have to guess between two federal statutes. There is only one federal government, and it should have only one rule with respect to its international commerce.

3. The Ninth Circuit held, by way of a strained and cursory analysis of statutory definitions, that "K" Line, the ocean common carrier that issued the through bill of lading, was a "rail carrier" subject to the jurisdiction of the Surface Transportation Board ("STB") and therefore to the liability regime of the Carmack Amendment. Pet. App. at 12a-13a. This is the first time that any federal appellate court has held that an international ocean common carrier regulated by the Federal Maritime Commission ("FMC") is a rail carrier subject to STB jurisdiction. The holding is wrong on its face for a number of reasons, including the fact that STB jurisdiction over water carriers is limited to carriers engaged in domestic (as opposed to international) transportation. *See* 49 U.S.C. § 13521. This aspect of the decision by itself warrants review because it will create regulatory and practical chaos if allowed to stand.[5] It also serves as a basis for the broader incorrect result below.

First, from a legal perspective, the Ninth Circuit has unwittingly created a conflict between the Interstate Commerce Act ("ICA") and the Shipping Act of

[5] An ocean carrier will subcontract for services from a variety of entities to effectuate delivery of cargo, including marine terminal operators, stevedores, trucking companies, and railroads. Subcontracting with such entities does not transform an ocean carrier into being such entities.

1984, as amended, codified at 46 U.S.C. § 40101 et seq. by P.L 109-304, 120 Stat. 1523. Under the ICA, the "jurisdiction of the Board over [] transportation by rail carriers . . . is exclusive." 49 U.S.C. § 10501(b). If ocean carriers are in fact rail carriers with respect to the inland legs of through moves for which they purchase services from railroads, then the Board's exclusive jurisdiction over those activities nullifies numerous provisions in the Shipping Act. FMC jurisdiction over the inland portions of through intermodal moves by international ocean carriers is referenced in the Shipping Act a minimum of seven times. *See, e.g.*, 46 U.S.C. §§ 40102(12), 40102(24), 40102(25), 40301(a)(1), 40501(a)(1), 40502(c), and 41105(4). The Ninth Circuit's unprecedented grant to the STB of *exclusive* jurisdiction over inland transportation under a through bill of lading issued by an international ocean carrier would negate the FMC's jurisdiction and upset a longstanding and clear delineation between the regulation of domestic water carriers and the regulation of international ocean carriers.

In addition to creating yet another conflict between two federal laws regulating transportation (the ICA and the Shipping Act[6]), the Ninth Circuit's ruling that ocean carriers that subcontract with rail carriers

---

[6] Contrary to a statement made in passing in one of the petitions, the FMC has no role in implementing COGSA. It has, in fact, expressly disclaimed any such authority. *See Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. Rep. (P&F) 111, 113 (Fed. Maritime Comm'n 1985) (holding that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ."). Thus, the additional conflict between federal statutes (the ICA and the Shipping Act) created by the decision below is separate from the COGSA/Carmack tension.

are themselves rail carriers creates a serious practical problem. Specifically, the decision below would allow Carmack's liability provisions to be altered by contract only if the ocean carrier, acting as the "rail carrier," first offered full Carmack terms to its shipper customer. *See* Pet. App. at 28a-29a. The problem with the suggestion is that the ocean carrier is able to offer through transportation to its customers because it has *already* negotiated a volume rate with the rail carrier in the United States (usually as part of a multi-year contract covering thousands of container shipments) – at a rate that assumes COGSA liability provisions that do not vary with each particular shipment. Requiring that current efficient system to be replaced by one in which the ocean carrier must ascertain the value of the goods in each of the thousands of containers on each vessel and then negotiate with the shipper and the rail carrier separately and in advance with respect to each shipment would cripple the ability of ocean carriers to provide predictable, through intermodal services to their customers.

In addition to imposing substantial transaction costs and delays, the fact is that such a system would simply be impossible to operate in many major ports. That is the case because many major ports are served by more than one railroad and hundreds of different trucking firms, and the ocean carrier may not know until the cargo is on the water (or after it has been discharged from the ship) which of its rail or trucking suppliers it will use for any given shipment. Further, an ocean carrier may substitute rail for truck or truck for rail in completing the inland portion of the through movement under a variety of circumstances. Such scenarios make advance liability discussions with shippers impossible. In short, the Ninth Cir-

cuit's proposed work-around for the problems that its incorrectly reasoned decision has created will not work, resulting in a loss of the very certainty, predictability, and efficiency that both COGSA and Carmack were designed to ensure.

CONCLUSION

The decision below, along with the recent Second Circuit decision in *Sompo*, improperly extends a domestic transportation scheme to international transportation, creates an unnecessary and unresolvable conflict between the Shipping Act and the Interstate Commerce Act, renders unworkable the flexible contracting provisions in the Shipping Act, the ICA, and COGSA, and threatens the ability of international ocean common carriers to provide predictable, efficient intermodal transportation services to their customers under a single bill of lading. The law neither requires nor allows those outcomes, and the Court should grant the writ and reverse.

Respectfully submitted,

JOHN W. BUTLER
Counsel of Record
MARC J. FINK
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 463-2500

Counsel for Amicus Curiae
The World Shipping Council

July 20, 2009